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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 145

COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND,
Petitioner,

v.

RHEEM MANUFACTURING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND APPENDICES

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IN THE

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No. ------

COMPTROLLER OF THE TREASURY OF THE STATE OF MARYLAND,

Petitioner,

v.

RHEEM MANUFACTURING COMPANY,

*Respondent.**

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on March 31, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported in 216 Md. 259, and in 140 A. 2d 301. It is printed in Appendix B hereto, *infra*, page 26.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on March 31, 1958. There was no motion for reargument. The jurisdiction of this Court is invoked under

* Companion case to *Comptroller v. Martin*, U. S. Supreme Court, Oct. Term 1957, No. 1096 — separate petitions for certiorari filed to avoid complicating Martin petition, upon which nearly all of the refunds in question depend.

28 U.S.C.A. 1257(3) since the validity of a State statute on grounds of repugnancy to the Fourteenth Amendment of the United States Constitution is drawn in question.

QUESTIONS PRESENTED

1. Whether the retroactive application of a 1957 amendment to the Maryland Sales and Use Tax Acts violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the lower court's holding that Rheem's transactions were not subject to the Maryland Sales and Use Tax Acts prior to the 1957 Amendment is in direct conflict with decisions of this Court involving similar transactions.

STATUTES INVOLVED

The statutory provisions directly involved were enacted as Chapter 3 of the Acts of the General Assembly of Maryland of 1957, and are now codified as Article 81, Sections 324(f)(6) and 372(d) of the Annotated Code of Maryland (1957 Ed., Vol. 7, pp. 493, 514). They are printed in Appendix A, *infra* page 22, together with certain other related sections of the Maryland Sales and Use Tax Acts.

STATEMENT

Rheem Manufacturing Company operates a plant at Sparrows Point, Baltimore County, Maryland. It is engaged generally in the manufacture of steel containers, drums, pails, gas drums, water heaters, tanks and boilers (R. 20).

Upon the outbreak of the Korean War in 1950, Rheem had developed a spiral-wrapped shell case in which the Government was interested and as to which the Government had offered Rheem a supply contract (R. 39). Rheem

had no facilities for the production of this item. It requested the Government to furnish the facilities and a facilities contract was negotiated with the Ordinance Corps of the Department of the Army.

This contract was practically identical with the facilities contracts which the Glenn L. Martin Company (now known as the Martin Company) had entered into with the United States Government, and which are involved in Martin's Petition for Writ of Certiorari to the Court of Appeals of Maryland filed in this Court.

The contract provided that certain facilities were to be furnished by the Government from its industrial reserves where available, but that the remaining facilities were to be purchased by Rheem from regular vendors (R. 49). The contract was a cost-reimbursement contract, and any sales and use taxes paid by Rheem to the State of Maryland were to be reimbursed to Rheem by the United States Government (R. 30, 51, 78). The contract provided that title to the facilities should pass to the Government upon delivery to Rheem (R. 50). Rheem was given the right to use the facilities for work on government contracts free of charge (R. 56). The contract also contained provisions, *inter alia,* relating to government approval of purchases (R. 50); the government's right to terminate Rheem's use of the facilities upon due notice (R. 58); Rheem's tagging of the facilities so as to show government ownership (R. 57); maintenance of the facilities by Rheem in accordance with government standards (R. 57); provisional payments by the government during the purchase program (R. 56); and final acceptance of the facilities before completion of payment by the government (R. 56). Rheem was not permitted to make any profit on its purchases of facilities under the contract (R. 51). Rheem used the fa-

cilities in the regular course of its business of supplying the government (R. 39).

In 1950, the then Attorney General of Maryland, Hall Hammond, now a Judge of the Court of Appeals of Maryland, had ruled that the Comptroller of the Treasury of Maryland should collect sales and use taxes on transactions similar to the Rheem purchases where title to facilities purchased by a contractor in its own name passed to the government upon delivery to the contractor. The Attorney General ruled that the passing of title to the facilities to the government did not make the transaction a "resale" which would exempt the facilities from sales taxes. 35 Opinions of the Attorney General 285, printed in Appendix C, *infra*, page 28.

Applying this ruling to the Rheem contracts the Comptroller of the Treasury, commencing in 1952, assessed sales and use taxes on the purchases of the facilities by Rheem. The taxes were paid under protest by Rheem, and a claim for refund in the amount of $4,306.60 was duly filed by Rheem (R. 2). A hearing on this claim was held by the Comptroller March 16, 1956 (R. 18-48). After the hearing, the Comptroller denied the refund (R. 91-94). Rheem duly appealed to the Circuit Court for Baltimore County (R. 94-98).

This claim for refund presented practically identical questions as those in the Glenn L. Martin claims for refunds. Thereafter the two cases were treated as companion cases. Martin and Rheem were represented by the same counsel. The Comptroller's office estimated that, if refunds were due Martin and Rheem, the State of Maryland would ultimately have to refund approximately one and a half million dollars not only to Martin and Rheem, but also to other

manufacturers who have contracts similar to Martin's and Rheem's.

Before Rheem's appeal from the Comptroller's decision was heard by the Circuit Court for Baltimore County, the Court of Appeals of Maryland, in July 1956, handed down a decision involving similar facilities contracts. *Comptroller v. Aerial Products,* 210 Md. 627, 124 A. 2d 805. One aspect of the decision concerned the purchasing contractor as agent of the United States Government. That aspect is in no way involved in the Rheem case. The other aspect involved an interpretation of the Sales and Use Tax Act relating to the purpose of the purchasing contractor. That aspect was similar to the question upon which Judge Hammond had ruled when Attorney General in 1950, and also to the matters concerned in the Martin claims for refund. The Court of Appeals of Maryland, in the *Aerial Products* case, *supra,* held that since Aerial Products, the contractor had not used the facilities purchased before title passed to the government these purchases were not subject to the Sales Tax Act. *Supra,* 210 Md. 627, 644, 124 A. 2d 805, 814.

Another case on a similar question involving private, as opposed to governmental, purchasers was decided by the Court of Appeals of Maryland in December 1956 before Rheem's appeal in the Circuit Court for Baltimore County was heard. *Baltimore Foundry v. Comptroller,* 211 Md. 316, 127 A. 2d 368. The Court of Appeals, in that case, held that sales of patterns by a foundry were not subject to sales tax since there were real and profitable resales, although it was not possible from the record to determine when title to the patterns passed to the purchaser for whom the products were cast prior to the beginning of production. The Court of Appeals of Maryland held, in effect, that time of passage of title was "not controlling" so long as the re-

sales were "profitable and real". *Supra*, 211 Md. 316, 322, 127 A. 2d 368, 370-371.

These two cases appeared to be a departure from what had been the long standing practice of the Comptroller in taxing purchases under facilities contracts. *This practice of taxing had been carried out for nearly seven years from 1950 through 1956, in accordance with the ruling of Judge Hammond when Attorney General.* These cases cast doubt on the taxability of the Rheem purchases under its contracts. Accordingly, the General Assembly of Maryland, at its next session, in order to clarify the situation and to avoid a possible substantial loss of revenue to the State of Maryland, particularly if the *Aerial Products* case were held to control such purchases, passed an act amending the Sales and Use Tax Acts so that there could be no question that these taxes would be due on purchases under facilities contracts such as Rheem's. The Legislature made these provisions retroactive to July 1, 1947, the date of the original enactment of the Sales and Use Tax Acts. As to Rheem they had a retroactive effect of five years, that is back to purchases made by Rheem in 1952.

After this enactment, Chapter 3 of the 1957 Acts (printed in Appendix B, *infra*, p. 22), Rheem was permitted to amend its appeal from the Comptroller's decision in the Circuit Court for Baltimore County so as to include the additional questions presented by Chapter 3. The federal question sought to be reviewed by this Court, the repugnancy of the retroactive effect of Chapter 3 to the Fourteenth Amendment to the United States Constitution, was first raised by Rheem in its petition to amend its complaint (R. 101).

The Circuit Court for Baltimore County subsequently heard Rheem's appeal March 22, 1957 (R. 109-112). It re-

versed the decision of the Comptroller. It found that there was no substantial difference between the Rheem and the *Martin* case and reversed the Comptroller for the reasons given in the *Martin* opinion, namely that the *Aerial Products* decision, *supra*, controlled Rheem under the law before the 1957 enactment. It also found that the retroactive effect of Chapter 3 was unreasonable and therefore, although not directly so stated, in violation of the Equal Protection Clause and the Due Process Clause of the United States Constitution, as well as in violation of Article 23 of the Maryland Declaration of Rights. It further found that the 1957 Act abrogated Article 8 of the Maryland Declaration of Rights, relating to separation of powers, and held that the Legislature by this enactment had usurped the function of the Court of Appeals and had attempted by legislation to reverse that court's decision in the *Aerial Products* case, *supra*. The Circuit Court for Baltimore County accordingly entered judgment for Rheem in the amount of $4,306.60 (R. 112).

From that decision, the Comptroller appealed to the Court of Appeals of Maryland. That Court, which is the highest court of Maryland and which had proper jurisdiction of the matter on appeal from the lower court, on March 31, 1958 affirmed the decision of the lower court. It filed its opinion the same day stating that there were no essential differences from the *Martin* case. Thus, (1) under its decision in *Aerial Products v. Comptroller,* 210 Md. 627, 124 A. 2d 805, Rheem would not be taxable under the Sales and Use Tax Acts as in force prior to January 1957; and (2) the retroactive application of Chapter 3 of the Acts of 1957, which in Rheem's case would amount to five years, was in conflict with Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. From

that judgment, the Comptroller files this petition for a writ of certiorari to review the decision of the Court of Appeals of Maryland.

REASONS FOR GRANTING THE WRIT

1. *This case should be decided finally by this Court and by no other, since the United States Government is the real party in interest.*

The refunds directly involved in this case, $4,306.60, will nominally be paid to Rheem. They will then be reimbursed by Rheem to the United States Government as a part of the cost of the facilities purchased under the contracts. Rheem is consequently only a conduit through which these taxes will be refunded to the Federal Government. Despite its obvious interest, the Federal Government has apparently preferred anonymity in this case. It did attempt at one point to intervene in the Martin case. It was denied this right by the Court of Appeals of Maryland, since its attempt was not timely made. It later partially abandoned its cloak of anonymity when it filed a brief as *amicus curiae.* in the Martin case. Otherwise, it has remained disguised in this case under the garb of Rheem. This seeking of reward under the guise of another is not entirely novel:

> "The voice is Jacob's voice, but the hands are the hands of Esau." Genesis 27:22.

2. *It is vital that this case be decided finally by this Court and by no other because of the far reaching effect of the decision of the Court of Appeals of Maryland in this case in other jurisdictions if allowed to stand*

This case is of great importance not only to the State of Maryland but also to all other States which impose sales and use taxes and in which private contractors and manu-

facturers operate under facilities contracts with the United States Government, or otherwise use government property for their own profit in their regular course of business. It is relatively unimportant, though nonetheless painful, that the Petitioner, the Comptroller of the Treasury of Maryland, may eventually have to refund approximately one and a half million dollars collected in sales and use taxes if the decision of the Court of Appeals of Maryland is allowed to stand.

3. *This case should be finally decided by this Court and by no other, since the decision of the Court of Appeals of Maryland is one in which the highest court of the State has ruled against the Treasury of its own State and in favor of the United States Treasury and based its decision, in essence, solely upon the repugnancy of a State statute to the Fourteenth Amendment to the United States Constitution.*

It is immaterial that the decision was also based on Article 23 of the Maryland Declaration of Rights, which reads as follows:

> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Annotated Code of Maryland (1957 Ed.) Vol. 9, p. 44.

The leading text on the Maryland Constitution divides the forty-five articles of the Declaration of Rights into four classes. Class B is defined as follows:

> "In this class are to be found articles two, three, seventeen, eighteen, nineteen, *twenty-three*, twenty-four and forty-two.
>
> The verbiage in some of these articles is slightly different from the wording of the similar provisions in the Federal Constitution, but in fact the matters cov-

ered by them are substantially covered by the Federal Constitution, and *for all practical purposes the provisions in the Maryland Declaration of Rights add nothing to what the law would be without them.*" *Niles, Maryland Constitutional Law,* page 13. (Emphasis supplied.)

The same text writer notes that Article 23, prior to the adoption of the Fourteenth Amendment to the United States Constitution in 1868, would have been placed in Class "C" "Limitations on the power of the States similar to those limitations prescribed in the United States Constitution for the Federal Government." Thus, additional protection would have been afforded a citizen of Maryland under Article 23 from 1776 through 1868, when the Fourteenth Amendment was adopted. However, as Niles states in his discussion of Article 23:

> "The rights secured by this article are now covered by the 14th Amendment to the United States Constitution, and consequently it may be properly termed *a mere duplication of provisions found in that instrument* and we have, therefore, placed it in Class B." *Niles, supra,* page 46. (Emphasis supplied.)

Niles' analysis of Article 23 has been consistently followed by the Court of Appeals of Maryland:

> ". . . article 23 of the Maryland Declaration of Rights is in harmony with the 5th and 14th Amendments to the Federal Constitution, and *the term 'due process of law,' as used in said amendments, has been construed to be synonymous with the expression 'law of the land' as used in said article. Niles, Constitutional Law,* p. 46." *Oursler v. Tawes,* 178 Md. 471 at 483, 13 A. 2d 763 at 768. (Emphasis supplied.)

The Court of Appeals has also recently stated:

> " 'In construing this article (23) of the Declaration of Rights, the decisions of the Supreme Court on the

> Fourteenth Amendment are 'practically direct authorities'." *Home Utilities Co. v. Revere*, 209 Md. 610 at 614, 122 A. 2d 109 at 110-111 (1956).

Citing the *Home Utilities* case, *supra*, the Court of Appeals has reaffirmed its decision on this point as recently as December, 1957. *Frostburg v. Jenkins*, 215 Md. 9 at 15, 136 A. 2d 852 at 845-855.

That part of the Martin holding, which controls this case, resting on Article 23, is merely surplusage, a redundancy. *The only real operative ground of the holding is the Fourteenth Amendment which, as an amendment to the United States Constitution, is part of the supreme law of the land and takes precedence over the Maryland Constitution and the Maryland Declaration of Rights.*

> *"The Constitution of the United States,* and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, *are, and shall be the Supreme Law of the State; and the Judges of this State and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding."* Article 2, Maryland Declaration of Rights, Annotated Code of Maryland (1957 Ed.), Vol. 9, p. 20. (Emphasis supplied.)

In the words of the Court of Appeals of Maryland, the decision of this Court would be practically a direct authority on Article 23. Furthermore, there is no reason why this Court cannot expressly construe Article 23 of the Maryland Declaration of Rights to determine whether Chapter 3 of the 1957 Acts violates its guarantees. This Court has construed a State Constitution in the past and has declared that it was not violated by certain provisions of a compact where the State court had found to the contrary. *West Virginia v. Sims*, 341 U.S. 22, 33, 95 L. Ed. 713, 724. This is not a case where the State court has the final

say, cf. *Arkansas v. Texas*, 346 U.S. 368 at 372, 98 L. Ed. 80 at 84, but one involving essentially a question of federal constitutional interpretation, *which should be decided by this Court and no other in order that "state courts will not be the final arbiters of important issues under the Federal Constitution". Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 84 L. Ed. 920, 924. (Emphasis supplied.)

4. *It is vital that this case be finally decided by this Court and by no other since the decision squarely presents the question of how far can a tax be retroactively imposed.*

As noted by the lower court in its opinion in the *Martin* case, upon which the Rheem decision was based, in discussing the case of *Welch v. Henry*, 305 U.S. 134, 83 L. Ed. 87, where this Court definitely held that a two year retroactive effect was valid:

> *"How far this limit extends was not defined by the Supreme Court in that case, or in any subsequent case to date."* Martin petition, page 40. (Emphasis supplied.)

The Court of Appeals noted in its opinion that it was grappling with the problem of "where the line should be drawn" as to the permissible extent of retroactivity. Martin petition, page 34. In analyzing a number of cases involving retroactive tax legislation, it duly noted that a tax is not necessarily invalid simply because it is retroactive. Martin petition, page 34. The court also took due note of the fact that this Court, as above set forth, has definitely declared that a two year retroactive effect does not exceed the limit of permissible retroactivity. Martin petition, page 39. The lower court discussed at length the case of *Wilgard Realty Co. v. Comm'r. of Internal Revenue*, 127 Fed. 2d 514 (2d Cir., 1942) cert. den. 317 U.S. 655, 87 L. Ed. 527, where a 1939 federal tax statute was allowed a retroactive effect on a 1932 transaction, i.e., a seven year retroactive effect.

Martin petition, page 43. Summarizing the cases, the Court of Appeals of Maryland concluded, as follows:

> "The instant case does not, in our estimation, fall within any of the usual types of cases in which retroactive taxing statutes have been upheld. It is not within the '*ratification*' cases, for there is no ratification; it is not within the group of cases which have upheld the correction of technical defects; and it is not within the 'recent transactions' cases, because the reach of the statute is too great in point of time — three to six years on the facts of this case. *The statute seeks to tax transactions completed long before the tax was in existence.* On the facts of this case and on the contentions submitted to us, we are of the opinion that the retroactive application of Chapter 3 of the Acts of 1957 would be in conflict with Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." (Emphasis supplied.) Martin petition, pages 45, 46.

Although Petitioner, in the lower court had, both in the briefs and on oral argument, pointed out that taxes had been imposed upon Rheem's purchases for nearly seven years, pursuant to the opinion of Judge Hammond when Attorney General, the Court of Appeals of Maryland for some reason took no note of this fact and nowhere in its opinion even mentioned that ruling which the Petitioner had duly followed. The Court of Appeals of Maryland stated that Chapter 3 of the Acts of 1957 sought to "place a tax where *none was imposed before*, and to reach transactions completed long before its enactment", Martin petition, page 45. It is respectfully urged that this statement simply does not conform with the facts and that the lower court was in error. Actually, taxes were imposed on Rheem and other manufacturers beginning in 1951, and continuing at least until 1956, the year of the *Aerial Products* decision, 210 Md. 627, 124 A. 2d 805. These taxes were imposed in accordance

with an official opinion of the Attorney General of Maryland who is now a member of the Court of Appeals of Maryland. In addition, until the Court of Appeals of Maryland held that the *Aerial Products* decision, supra, governed the Martin and Rheem purchases, the *Aerial Products* case actually did not forbid the imposition of such taxes upon Rheem. Therefore, the State of Maryland validly collected such taxes from Rheem and all other taxpayers similarly situated until March 31, 1958, the date of the decision of the Court of Appeals of Maryland in this case.

5. *It is vital that this case should be decided by this Court and by no other, since this decision, if allowed to stand, is a blow not only to other States but also to the declared policy of the Federal Government itself which, for a number of years, has been encouraging the States to re-assume a greater share of responsibility for local government.*

The recent decisions of this Court show that local governments are constantly being allowed greater freedom of taxation in order that the economic burden of government can be more equally shared. There is a long line of cases in this Court showing the development of the theory of the permissible reach of local taxation from *McCullough v. Maryland*, 4 Wheat. 316, 4 L. Ed. 379 through *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. Ed. 155, 58 S.C. 208; *Alabama v. King & Boozer*, 314 U.S. 1, 86 L. Ed. 3, 62 S.C. 43; and *Curry v. United States*, 314 U.S. 14, 86 L. Ed. 9, 62 S.C. 48, to *United States v. City of Detroit*, ... U.S. ....., 2 L. Ed. 2d 424, 78 S.C. .....; *United States v. Township of Muskegon*, ... U.S. ....., 2 L. Ed. 2d 436, 78 S.C. .....; and *City of Detroit v. Murray Corp.*, ... U.S. ....., 2 L. Ed. 2d 441, 78 S.C. .....

As stated in the *Detroit* and *Muskegon* cases, supra, this Court should go "beyond the bare face of the taxing statute to consider all relevant circumstances." *United States v. Detroit, supra,* 2 L. Ed. 2d 424 at 427. It should consider the "practical operation" of the tax statute and "not its definition or precise form of descriptive words". It should look through form and behind labels to substances since "empty formalisms are too shadowy a basis for invalidating State tax laws." *Detroit v. Murray Corp., supra,* 2 L. Ed. 2d 441 at 445-446. It is respectfully urged that it is vital that this Court, in deciding this case, look through the form and labels of Chapter 3 to the substance of the Act and determine its exact operative effect. It should not be invalidated simply because of empty formalisms.

In this case the Maryland Legislature obviously intended to impose a tax on purchases such as Rheem's when it enacted the Sales and Use Tax Act in 1947. It was so advised that it had done so by the Attorney General of Maryland in 1950. It thereupon collected such taxes from Rheem from 1952 through 1955. When the Court of Appeals of Maryland handed down a decision which cast doubt on this policy of taxation, the Legislature immediately, at its next session, re-affirmed its purpose and enacted Chapter 3, thus subsequently providing the legislative foundation which may possibly have been lacking after the *Aerial Products* decision. Such action in no way constituted a reversal of the Court of Appeals of Maryland, so as to constitute a breach of Article 8 of the Maryland Declaration of Rights, providing for separation of powers. *Sanitary Comm'n. v. Noel,* 155 Md. 427, 433, 142 A. 634, 636, cert. den. 278 U.S. 573, 73 L. Ed. 513. On the contrary, the Legislature was simply performing its proper "function of closing loopholes." *Comptroller v. American Can Co.,* 208 Md. 203 at 209, 117 A. 2d 559 at 561. It called this enactment a new tax and re-imposed it retroactively.

The Maryland Legislature has thus done everything possible to impose sales and use taxes upon Rheem's purchases which, under the recent decisions of this Court in the *Detroit* and *Muskegon* cases cited hereinabove, it was clearly entitled to do. The Court of Appeals of Maryland, in handing down its decision, did not reach this aspect since it declared Chapter 3 constitutionally invalid because of its excessive retroactive reach. It is, however, vital that this Court consider this aspect of the case because of the important effect on other States seeking to impose taxation of this type, and further, because the decision, if allowed to stand, will thwart the declared policy of the Federal Government in urging the States to assume a greater share of the burden of government.

6. *It is vital that this Court consider that part of the holding dealing with the pre-1957 law since that part appears to be in conflict with recent decisions of this Court.*

Although the second question presented may not appear on its face to raise a federal question since it involves the interpretation by a State court of its own State law,, nevertheless Petitioner respectfully urges that the Court carefully examine the holding of the lower court on the question of taxation of Rheem's transactions under the Maryland Sales and Use Tax Acts prior to the 1957 Amendments since that part of the holding appears to be contrary to the holdings of this Court in *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. Ed. 155, 58 S.C. 208; *Alabama v. King & Boozer*, 314 U.S. 1, 86 L. Ed. 3, 62 S.C. 43; and *Curry v. United States*, 314 U.S. 14, 86 L .Ed. 9, 62 S.C. 48. In all of these cases, as well as in the cases recently decided by this Court, *United States v. City of Detroit*, ... U.S. .....; 21 L. Ed. 2d 424, 78 S. Ct.; *United*

States v. Township of Muskegon, ... U.S. ....., 2 L. Ed. 2d 436, 78 S. Ct. .....; and *City of Detroit v. Murray Corp.*, ... U.S. ....., 2 L. Ed. 2d 441, 78 S.C. ....., transactions similar to Rheem's were subjected to local taxation.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX A

Statutory Provisions Involved

Chapter 3 of the 1957 Acts of the General Assembly of Maryland and related sections of the Maryland Sales and Use Tax Acts.

Retail Sales Tax Act

(Chapter 281, Acts of 1947, Article 81, Sec. 324, *et seq.*)

Sec. 324. (Definitions.) As used in this sub-title, the following terms shall mean or include:

* * * * * *

(d) "Sale" and "Selling" mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration including rental, lease or license to use, or royalty, by a vendor to a purchaser, or any transaction whereby services subject to tax under Section 325 of this sub-title are rendered for consideration to any purchaser by any vendor. Such consideration may be either in the form of a price in money, rights or property or by exchange or barter, and may be payable immediately, in the future, or by installments. Nothing in this sub-section shall apply to the renting of textiles, the essential part of which includes the recurring service of laundering or cleaning thereof, nor the rental of machines and equipment used exclusively for agricultural purposes.

* * * * * *

(f) "Retail sale" and "sale at retail" shall mean the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this sub-title. Said term shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to

resell the property so transferred in the form in which the same is, or is to be received by him, or to use or incorporate the property so transferred, as a material or part, or other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining. For the purpose of the tax imposed by this sub-title, the term "sale at retail" shall include but shall not be limited to the following:

* * * * * *

Sec. 326. (Exemptions.) The tax hereby levied shall not apply to the following sales:

* * * * * *

(e) Casual and isolated sales by a vendor who is not regularly engaged in the business of selling tangible personal property.

(f) Sales which are not within the taxing power of this State under the Constitution of the United States.

* * * * * *

(k) Sales by manufacturers or producers of their own manufactured products when sold to other manufacturers, producers, wholesale or retail merchants for the purpose of resale. The exemption in this subsection shall not extend to or include sales by manufacturers or producers of their own manufactured products when sold to purchasers and not for the purpose of resale.

MARYLAND USE TAX

Sec. 372. (Definitions.) As used in this sub-title, the following terms shall mean or include:

* * * * * * *

(d) "Use" means the exercise by any person within this State of any right or power over tangible personal property purchased either within or without this State by a purchaser from a vendor and includes but is not

limited to the receipt, storage, keeping or retention for any length of time of any building materials by any contractor, builder, or property owner. The term shall not include the following:

(1) The sale of tangible personal property by any vendor in the regular course of business,

(2) The incorporation of tangible personal property as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining.

* * * * * *

(h) "Retail sale" and "Sale at retail" means all sales in any quantity or quantities of tangible personal property whether within or without this State to any person for the purpose of use, storage or consumption within this State. For the purpose of the tax imposed by this sub-title, the term "sale at retail" shall not be limited to the following:

* * * * * *

Sec. 375. (Exemptions.) The use, storage or consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this sub-title:

(a) Tangible personal property upon which a retail sales tax has been paid to this State under the terms and provisions of Section 325 of this Article.

(b) Tangible personal property expressly exempted from the retail sales imposed by this State under the terms and provisions of Section 326 of this Article.

(c) Tangible personal property sold by any non-resident vendor to a purchaser, a resident of this State, if the sale thereof would have been exempt from the retail sales tax imposed by this State under Section 326 of this Article had said sale been made in this State.

CHAPTER 3 OF THE ACTS OF 1957
(Senate Bill 32)

AN ACT to add, effective July 1, 1947, a new Section 320(f) (6) to Article 81 of the Annotated Code of Maryland (1951 Edition and 1956 Supplement), title "Revenue and Taxes", sub-title "Retail Sales Tax Act", to follow immediately after 320(f) (5) thereof, more clearly to define "retail sale" and "sale at retail" as used in the Retail Sales Tax Act; and to repeal and re-enact, with amendments, effective July 1, 1947, Section 368(d) of Article 81 of the Annotated Code of Maryland (1951 Edition), title "Revenue and Taxes", sub-title "Maryland Use Tax", more clearly to define the word "Use" as used in the Marlyland Use Tax Act; and to provide that no person shall be subject to criminal prosecution as a result of the retroactive nature of this Act.*

WHEREAS, it is and has always been the intent of the General Assembly of Maryland that the definition of "Retail Sale" and "Sale at Retail" should include all sales, except sales in which the sole purpose of the purchaser is to resell the tangible personal property or services which he purchases either in the form in which the same is received by him; or to use or incorporate the property as a material or part of other tangible personal property, to be produced for sale, by manufacturing, assembling, processing or refining; and

WHEREAS, it is and always has been the intent of the General Assembly of Maryland that the definition of "Use" in the Maryland Use Tax should exclude only such property or service which is held solely for resale in the regular course of business or which is to be incorporated as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining; and

WHEREAS, the uniform administrative interpretation and enforcement by the Comptroller of the Treasury since the inception of the Retail Sales Tax Act and the

* Note: Sec. 320(f)(6) now codified as Sec. 324(f)(6). Sec. 368(d) now codified as Sec. 372(d).

Maryland Use Tax has been in conformity with the provisions of this Act, therefore:

SECTION 1. *Be is enacted by the General Assembly of Maryland,* That effective as of July 1, 1947, Section 320(f) (6) be and is hereby added to Article 81 of the Annotated Code of Maryland (1951 Edition and 1956 Supplement) title "Revenue and Taxes" sub-title "Retail Sales Tax Act" to follow immediately after Section 320(f) (5) and to read as follows:

320(f) (6) Sales of tangible personal property and/or services to any person who will use the same as facilities, tools, tooling, machinery or equipment (including, but not limited to dies, molds and patterns) even though such person intends to transfer and/or does transfer title to such property or service either before or after such person uses facilities, tools, tooling, machinery or equipment.

If the user of facilities, tools, tooling, machinery or equipment (including, but not limiting to, dies, molds and patterns) is under obligation, by the terms of a written contract, at the time he purchases the facilities, tools, tooling, machinery or equipment (including, but not limited to, dies, molds and patterns) to transfer title to the same, at a price equal to or greater than his purchase price, to the person for whom he manufactures goods or performs work, such transfer shall not give rise to a second tax.

SEC. 2. *And be it further enacted,* that effective July 1, 1947, Section 368(d) of Article 81 of the Annotated Code of Maryland (1951 Edition), title "Revenue and Taxes" sub-title "Maryland Use Tax" be and the same is hereby repealed and reenacted with amendments to read as follows:

368(d) "Use" means the exercise by any person within this State of any right or power over tangible personal property purchased either within or without this State and includes but is not limited to the re-

ceipt, storage, keeping or retention for any length of time of any building materials by any contractor, builder, or property owner. This term shall also include but not be limited to use of facilities, tools, tooling, machinery or equipment (including, but not limited to dies, molds and patterns) by a purchaser thereof even though he transfers title to another either before or after use by him and without regard to whether title is transferred to the other within or without this State. This term shall not include the following:

(1) The sale of tangible personal property by any vendor in the regular course of business.

(2) The incorporation of tangible personal property as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining.

Sec. 3. And be it further enacted, That no person shall be subject to criminal prosecution or criminal penalties because of any violation of the provisions of these sections which occurred prior to the passage of this Act. Nothing contained in this act shall render taxable any sale or use of tangible personal property that is or was exempt from taxation under any exemption set forth by the expressed terms of sections 322 or 370 of Article 81 of the Annotated Code of Maryland (1951 edition and 1956 supplement).

Sec. 4. And be it further enacted, That if any one or more sections, clauses, sentences, words or parts of this Act shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions hereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause or provision of this Act in any one or more instances shall not be taken

to affect or prejudice in any way its applicability or validity in any other instance.

Sec. 5. And be it further enacted, That this Act is hereby declared to be an emergency measure and necessary for the immediate preservation of the public health and safety and having been passed by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly of Maryland, the same shall take effect from the date of its passage.

Approved January 28, 1957.

APPENDIX B

Opinion of Court of Appeals of Maryland

This is a companion case to *Comptroller v. The Glenn L. Martin Company* (No. 128, September Term, 1957), ... Md. ....., A. 2d ..... . The two cases were submitted together in the Circuit Court for Baltimore County under an agreement between counsel for both parties that the decision in the *Martin* case would be binding in this case. The Circuit Court, in accordance with that stipulation and basing its order upon its opinion in the *Martin* case reversed the action of the Comptroller, which had denied a refund of sales and use taxes to the appellee, Rheem Manufacturing Company ("Rheem"); and the court ordered that Rheem "have judgment for $4,306.60, the amount of its claim for refund." The Comptroller appeals.

There are no essential differences between this case and the *Martin* case. Rheem has a plant at Sparrows Point, Maryland, at which it is engaged generally in the manufacture of steel containers, drums, pails, water heaters, tanks and boilers. The Army wanted Rheem to produce a particular type of shell case for use in the Korean War. Since Rheem did not have the facilities for the production of such shell cases, it entered into a facilities contract with the United States Government, acting through the Department of Defense, which was of the same general type as the facilities contracts involved in the *Martin* case. Purchases of facilities thereunder, in respect of which the Comptroller held sales and use taxes were payable (the two being segregated in this case), extended from November, 1952 through April, 1955. Rheem, unlike Martin, did not furnish resale certificates to its vendors, as called for by Rule 40 of the Rules and Regulations of the Comptroller.

No point was made of this difference in the trial court, and the stipulation above referred to would seem to have eliminated it from consideration. It does not appear to have been passed upon by the trial court and it is not referred

to in Judge Raine's opinion. Consequently, it stands no better than did the same point in *Comptroller v. Aerial Products, Inc.*, 210 Md. 627, 124 A. 2d 805, and it is not properly before us.

There is no basis for distinguishing between the *Martin* case and this case as the two appeals have been presented to us, and the decision in the *Martin* case, which we shall not restate or summarize here, is controlling.

ORDER AFFIRMED, WITH COSTS.

APPENDIX C

Opinion of Attorney General of Maryland
Reported in Volume 35 at page 285

January 4, 1950

Edward F. Engelbert, Esq.
Retail Sales Tax Division
Office of State Comptroller
34 Hopkins Place
Baltimore 1, Maryland

Dear Mr. Engelbert:

This opinion deals with Sales and Use Taxes upon sales of personal property to contractors performing research and development work for the United States Navy. We have discussed the matter at length personally and by correspondence with Lt. Commander Albert L. O'Bannon, Chief Tax Officer under the Judge Advocate General, who has submitted to us a memorandum presenting the Navy's position.

It seems that the Kellex Corporation (admittedly an independent contractor as distinct from an agent) is under contract with the Navy to conduct research and development in connection with ordnance equipment. This work is done under Navy supervision in a plant at Silver Spring, Maryland, owned by the United States and leased to Kellex. Kellex buys all of the materials in its own name and is reimbursed for their cost by the Government. Most of the materials are consumed in the research and development process.

The contract provides:

> *"Article 4. Title and Identification of Material.*
>
> "(a). The title to all materials, parts, assemblies, sub-assemblies, supplies, equipment and other property for the cost of which the Contractor is entitled to be reimbursed hereunder shall automatically pass to and vest in the Government upon delivery to the

Contractor or upon the happening of any other event by which title passes from the vendor, or supplier thereof, in the case of any such property which is purchased for the performance of this contract, or, in the case of property not so purchased, upon the allocation thereof to the contract by the commencement of processing or use thereof or otherwise. Such passage and vesting of title shall not impair any right which the Government might otherwise have under the contract, and shall not relieve the Contractor of any of its obligations under this contract."

Under *Alabama v. King & Boozer*, 314 U.S. 1 (1941), there is no question of the State's power to impose the tax on the sales in question. The Federal Government's real contention is based upon construction of the Maryland Sales and Use Tax Acts.

It argues that as title to the goods passes to the Government immediately upon its passage to Kellex, the sales involved are sales "in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be received by him" within the meaning of Section 259 (f) of Article 81 of the Code of Public General Laws. He points out that Section 259 (d) defines "sale" and "selling" to mean "any transaction whereby title or possession, or both, * * * is to be transferred by any means whatsoever for a consideration by a vendor to a purchaser."

Conceding for the sake of argument that the purchaser (Kellex) does "resell the property so transferred in the form in which the same is, or is to be received by him", is this "the purpose" of Kellex within the meaning of Section 259 (f)?

The dominant purpose of the contract is research and development, which imply the employment of special knowledge and skills, experimentation, trial and error. It is primarily a contract for services. In the process, materials are necessarily purchased, combined, reworked, con-

sumed and discarded. The passage of title to these materials to the Navy appears to be merely an incident to the main object of the contract. A purpose of the contract, such passage of title may be; but it is not *the main* purpose. And as applied to such a mixed transaction, if they have any meaning at all, the words: "the purpose of the purchaser" (as used in Section 259(f)) must mean "the dominant purpose". We think the exception is intended to apply to wholesalers, retailers and manufacturers in the ordinary sense — not to an ultimate consumer. Though the contract in question incidentally provides for immediate passage of title to the Government, Kellex is in reality (certainly as to most of the material purchased), and within the purpose of the contract, the ultimate consumer.

For these reasons, we think sales to Kellex for use under its contract with the Navy are not exempt from the Maryland Sales and Use Taxes.

Very truly yours,

(Signed) HALL HAMMOND,
Attorney General,

(Signed) WARD B. COE, JR.,
Assistant Attorney General.

HH:MH
WBC